

**BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES R. SLEAD)	
Claimant)	
V.)	
)	
WALMART)	Docket No. 1,033,831
Respondent)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of Administrative Law Judge Bruce E. Moore's July 1, 2014 Review & Modification Award. The parties waived oral argument scheduled for November 4, 2014.

APPEARANCES

By way of briefs, Deborah K. Mitchell, of Wichita, appeared for the claimant, while Michael D. Streit, of Wichita, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Review & Modification Award.

ISSUES

The parties resolved this claim by an agreed running award on April 27, 2009, which compensated claimant for a 22.896% whole person functional impairment. The claimant filed an application for review and modification of that award on November 7, 2012. The judge found claimant's disability increased to a 79.25% permanent partial general "work" disability based upon a 100% wage loss and 58.5% task loss.

Claimant requests the Award be modified, arguing the evidence proves he is permanently and totally disabled. Claimant asserts the judge did not give appropriate weight to the testimony of Joshua Durham, M.D., who was claimant's authorized treating physician, and Michael Johnson, M.D., claimant's retained medical expert.

Claimant contends the judge erred in relying upon the testimony of Claudia Hertel, respondent's human resources coordinator, to the effect that respondent had accommodated work available for claimant, based on her having no firsthand knowledge of claimant's daily actual work as a fitting room associate and the demands required of that position. Respondent maintains the Award should be affirmed.

The issue for the Board's review is if claimant is permanently and totally disabled.

FINDINGS OF FACT

Claimant is 64 years old. He has an 8th grade education and obtained a G.E.D. in the 1970s. He lives in Great Bend and worked at respondent's store in such city.

On September 18, 2006, claimant, while working for respondent as an inventory control specialist, injured his back when pulling a loaded pallet jack. Respondent provided medical treatment, but conservative treatment failed to provide relief. Claimant underwent left-sided L4-5, L5-S1 hemilaminotomies with foraminotomies and a microdiscectomy at L5-S1 on March 7, 2007, by B. Theo Mellion, M.D. Unfortunately, claimant's pain continued and Dr. Mellion performed an anterior lumbar fusion at L5-S1 on February 6, 2008.

Clara Barton Medical Clinic/Russell Family Medical Care (CBMC) records indicated claimant continued to have low back and leg pain following his second surgery.

Claimant returned to work for respondent in May 2008. He had restrictions against lifting over 10-15 pounds, no excessive or repeated bending or twisting, no kneeling, squatting, stooping, crawling and climbing, and a requirement that he be allowed to sit for part of his work. Presumably, these were temporary restrictions.

On December 1, 2008, claimant was released by Dr. Mellion with restrictions of no frequent or repetitive lifting, pushing or pulling of more than 35-40 pounds, and occasional lifting, pushing or pulling up to a maximum of 35-40 pounds until a functional capacity evaluation (FCE) could be performed. Claimant was not seen again by Dr. Mellion. There is no evidence the FCE was conducted.

Following his release, claimant returned to work for respondent as a fitting room associate. His job duties included answering the telephone, directing calls to management, letting people in and out of the dressing rooms, checking for lost tags, picking up clothing left behind by customers and cleaning the dressing rooms, which included sweeping the floors and wiping down the mirror and seat.

A December 10, 2008 record from CBMC stated claimant had chronic low back pain with left leg radiculopathy. He was taking Ultram at the time for his pain.

On January 21, 2009, claimant was seen by Pastor Causin Jr., M.D., for purposes of obtaining a permanent impairment and restrictions. In an associated report, Dr. Causin assigned a 20% whole person functional impairment pursuant to the AMA *Guides*¹ (hereafter *Guides*). Dr. Causin restricted claimant to light work capacity as defined in the Dictionary of Occupational Titles, U.S. Department of Labor.

On February 17, 2009, claimant told a physician assistant at CBMC that he sometimes had bad days and taking Ultram did not always help.

Respondent complied with Dr. Causin's light duty work restrictions after receiving them on February 25, 2009.

On April 27, 2009, the claim was settled on a running award, with review and modification and future medical left open. Under the terms of the settlement, claimant received compensation for a 22.986% whole person functional impairment. Dr. Causin's report was entered into evidence to support the terms of the settlement. Claimant continued to work for respondent in his accommodated position.

On June 2, 2009, claimant told Joshua Durham, D.O, a board certified family physician at CBMC, that Ultram was not working and he wanted a stronger drug. Dr. Durham switched claimant to Darvocet.

On September 1, 2009, claimant lifted a box at work and had acute left lumbar pain and immediate radiation into the left patellar region. Claimant was maintained on Darvocet. On September 8, physical therapy was ordered. A September 22, 2009 record from CBMC indicated claimant was doing better. A physician assistant, Phillip D. Barnes, restricted claimant against lifting over 20 pounds and instructed he should be able to change positions, whether to sit or to stand, if he felt fatigue or pain in his back.

On October 6, 2009, claimant advised PA Barnes that respondent honored his 20 pound lifting limit, but he found it difficult to be able to sit down as necessary to relieve his back pain. PA Barnes learned claimant's left leg pain had been present ever since claimant's prior back surgery. PA Barnes lifted the 20 pound weight restriction and returned claimant to whatever prior weight limit he already was under, but continued the restriction that claimant be allowed to sit, stand or change position every hour as necessary. By November 5, 2009, claimant informed PA Barnes he was back to his baseline status. PA Barnes released claimant from the restrictions imposed at their prior visit and returned claimant to his prior restrictions.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*. The judge indicated Dr. Causin's report was part of the evidentiary record without objection from the parties. (R.M.H. at 30).

The CBMC records include an August 3, 2010 “Medical Questionnaire” indicating claimant had requested accommodation under respondent’s “Accommodation in Employment Policy.” The diagnosis listed was chronic low back pain with radiculopathy that resulted in claimant not being able to sit or stand long periods of time without pain. Some largely illegible restrictions were listed and someone left an illegible signature where a physician was supposed to sign.

Dr. Durham switched claimant’s chronic back pain medication from Darvocet to Percocet on January 12, 2011, because Darvocet was not working and had been taken off the market, and from Percocet to Nucynta on June 21, 2011. When Nucynta did not provide claimant relief, Dr. Durham switched claimant back to Percocet.

On August 11, 2011, claimant complained to Dr. Durham that his pain medication was not working. Dr. Durham increased claimant’s monthly Percocet prescription from 180 pills to 240 pills. By June 18, 2012, Percocet was no longer helping claimant’s chronic back pain and his radicular symptoms had gotten worse, so Dr. Durham prescribed MS Contin and decreased his Percocet dosage. On July 23, 2012, Dr. Durham discontinued MS Contin because it was not helping with claimant’s pain, but he prescribed Oxycontin and continued claimant’s Percocet. However, Dr. Durham discontinued Oxycontin – it did not seem to help – and simply had claimant on Percocet (180 tablets per month) after claimant’s September 10, 2012 appointment.

On September 17, 2012, claimant notified respondent in writing of his intent to end his employment effective October 1, 2012. Claimant’s last day of work was September 20, 2012. During the exit interview, claimant reported his reason for leaving was to “retire” and respondent noted claimant was eligible for rehire.² Claimant has not subsequently worked.

On October 11, 2012, claimant returned to Dr. Durham indicating “he needs a letter for his lawyer for disability.”³ The same day, Dr. Durham authored a letter which stated:

This patient has had a history of chronic low back pain since around 2006. He had a back injury and ended up having to have two spinal surgeries. Got a synthetic disk put in. He continues to suffer from chronic low back pain to the point where he has to use narcotics for pain control. He was put on a ten pound weight lifting restriction by his surgeon as well as a restriction for no bending activity. When he sits in a stationary position, he can not sit for more than one hour but without having to get up and move around. He also can not stand in one single position for more than thirty minutes. He continues to have radicular symptoms down his left leg as well as some mild weakness throughout his bilateral lower extremities. The majority of his pain is in the lumbar distribution and he has tried multiple medications in the

² R.M.H., Resp. Ex. A.

³ Durham Depo., Ex. 2 at 1, 15.

past to try to get his pain under control to where he could pretty much make it through a day. He has been on Zolpidem, prednisone, OxyContin, oxycodone, sertraline, morphine, hydrocodone, tramadol, cyclobenzapril, methocarbamol, gabapentin and is now on Percocet and OxyContin. He has to use these medications in order to make it through a day. I have been seeing this patient for a few years and he has just continued to deteriorate, as far as his back and pain is concerned. He does not feel like he can work any more in his current situation and, I do tend to agree that it would be very difficult for him to have some type of gainful employment given his current physical ailments.⁴

Shortly thereafter, Dr. Durham moved his practice to Boise, Idaho. On December 10, 2012, T. Scott Webb, D.O., took over monitoring claimant's medication. On March 11, 2013, claimant told Dr. Webb that his chronic low back pain increased in intensity and he "cannot handle it any further"⁵

On February 21, 2013, claimant was seen at his attorney's request by Michael Johnson, M.D., a board certified orthopedic surgeon. Dr. Johnson reviewed medical records, took a history and performed a physical examination. Dr. Johnson diagnosed claimant with: (1) lumbar spondylosis, disc degeneration, lateral recess stenosis L4-5 and lumbar spondylosis and disc herniation L5-S1; (2) status post left L4-5 and L5-S1 hemilaminotomies and foraminotomies and L5-S1 disectomy; (3) status post L5-S1 anterior lumbar interbody fusion surgery; (4) chronic low back pain; (5) chronic left lower extremity radiculopathy; (6) narcotic dependency; and (5) mild left hip arthritis.

Under the section entitled "Plans/Questions/Conclusions," Dr. Johnson stated:

1. His current condition is severe, chronic functionally disabling low back pain and left leg radicular pain. No improvement. He requires strong narcotics for pain management. He has plateaued as far as any improvement. It affects his [activities of daily living] and any work.
2. Future medical is chronic narcotic pain management either as oral pill or patches. He is likely to need this for rest of his life. No surgery or other therapies, including injections, to recommend.
3. He does need restrictions. I would consider his current restrictions of <10 Lbs lifting, no bending or lifting from bent position, and sitting for 1 hours then move around for 30 minutes to be appropriate.⁶

⁴ *Id.*, Ex. 3.

⁵ *Id.*, Ex. 2 at 6.

⁶ *Id.*, Ex. 2 at 6-7.

Dr. Johnson noted claimant required a cane to ambulate and was unable to squat or rise from a squatting position. Dr. Johnson assigned a 10% whole person functional impairment based on Lumbosacral DRE Category III of the *Guides*.

On April 19, 2013, claimant was seen at respondent's request by John Estivo, M.D., a board certified orthopedic surgeon. Dr. Estivo reviewed medical records, took a history and performed a physical examination. Dr. Estivo diagnosed claimant with status post hemilaminotomies with foraminotomies at L4-L5 and L5-S1 with microdisectomy at L5-S1 toward the left, and status post anterior interbody fusion at L5-S1. Dr. Estivo assigned a 10% whole person functional impairment based upon Lumbosacral DRE Category III of the *Guides*. In addressing claimant's employment capability, Dr. Estivo stated:

I have reviewed the operative reports of the two different lumbar spine surgeries this patient has undergone. The first surgery resulted in decompression of the nerve roots without a fusion. The second procedure was an anterior fusion at one level of his spine. Neither of the surgeries should result in an individual completely incapable of working at all. . . . In my opinion, this patient is capable of gainful employment within physical restrictions. After reviewing his records and examining this patient, in my opinion he can work within restrictions of no more than a maximum of 25 pounds to be lifted. No constant bending or twisting.⁷

Dr. Johnson testified on December 10, 2013. While Dr. Johnson acknowledged he relied on the restrictions set out in Dr. Durham's letter dated October 11, 2012, he testified he felt those restrictions were "appropriate."⁸ Dr. Johnson testified if work was available, claimant would be capable of working within the restrictions he placed on him.

Dr. Johnson reviewed the task list generated by Paul Hardin, a vocational consultant. According to the judge's Award, of the 44 unduplicated tasks on the list, Dr. Johnson opined claimant was unable to perform 38 tasks for an 86% task loss. The tasks Dr. Johnson found claimant capable of performing included operating a forklift, attending meetings, training technicians, operating a computer, reading charts and technical manuals and driving vehicles. Dr. Johnson did not state claimant was permanently and totally disabled, unable to engage in substantial and gainful employment or essentially and realistically unemployable.

At the December 13, 2013 Review & Modification Hearing, claimant testified that after his last low back surgery, he returned to work in an accommodated position as a fitting room associate for three years and five months. Claimant testified he is in constant pain 24 hours a day, for which he takes Oxycodone and Percocet.

⁷ Estivo Depo., Ex. 2 at 8.

⁸ Johnson Depo. at 22.

Claimant testified that while respondent was “as easy and understanding” as it could be in trying to accommodate his restrictions, it had a business to run. He testified his work as a fitting room associate prevented him from adhering to his restrictions and he “absolutely” was unable to do such job within his restrictions.⁹ He testified his restrictions included having to sit for one hour, which could not occur due to customer interruptions. Claimant testified he told his supervisor, Sherrie Morgan, “many times” about difficulties he had complying with his restrictions in his fitting room job,¹⁰ and said she simply told him, “That’s part of the job, you have to do it.”¹¹ Ms. Morgan did not testify. Claimant also testified he could not perform any of the jobs he did for respondent in his current condition.

Claimant testified he retired from respondent and agreed the associated paperwork indicated he was voluntarily terminating his employment to retire. However, he testified he discussed with respondent’s management the problems he was having performing his accommodated job before he retired. He also testified, “I mean, as far as the voluntary termination, I knew I could no longer do the work, and I knew I was putting in for Social Security.”¹² He was placed on social security disability effective September 2012.

Claimant, after resigning, asked Dr. Durham to provide him a letter indicating he could no longer work for social security purposes. Claimant acknowledged telling Dr. Durham that Dr. Mellion restricted him against lifting over 10 pounds and bending or lifting from a bent position, and acknowledged that he likely told Dr. Johnson he had a 10 pound restriction. However, he acknowledged he was not given such restrictions from Dr. Mellion and he admitted the 10 pound restriction he told physicians about was in error.

Claimant testified he would return to work for respondent under Dr. Johnson’s restrictions, but only if respondent would “stand by it a hundred percent . . . ”¹³ and he agreed he would try to work under such restrictions if respondent “could truly” provide such accommodation.¹⁴ He disagreed with Dr. Johnson’s opinion that he could work under Dr. Johnson’s restrictions. Claimant testified he could not work under Dr. Estivo’s restrictions. He also testified he is unable to work at all.

⁹ R.M.H. at 14.

¹⁰ *Id.* at 13.

¹¹ *Id.* at 14.

¹² *Id.* at 25.

¹³ *Id.* at 32.

¹⁴ *Id.* at 34.

Mr. Hardin testified on January 2, 2014. Claimant told Mr. Hardin that he quit his job because of pain. While Mr. Hardin testified claimant could perform some of the tasks in the job history, it was his opinion claimant is “100 percent essentially and realistically unemployable in the open labor market.”¹⁵ In terms of restrictions, it appears Mr. Hardin only considered claimant’s restrictions from Dr. Johnson. All reports Mr. Hardin has ever prepared have been for claimants.

Steve Benjamin, a vocational rehabilitation consultant hired by respondent, testified on January 6, 2014. In terms of restrictions, it appears Mr. Benjamin only considered claimant’s restrictions from Dr. Estivo. Mr. Benjamin believed claimant retained the ability to engage in substantial and gainful employment. Mr. Benjamin projected that based upon Dr. Estivo’s work restrictions, claimant could expect to earn approximately \$378.32 per week. When questioned whether claimant had the ability to continue earning what he made for respondent, Mr. Benjamin testified, “If the reason is that he quit, there wouldn’t be any reason why he couldn’t have continued that job, yes.”¹⁶ Over 90% of Mr. Benjamin’s testimony has been on behalf of respondents.

Dr. Durham testified on March 11, 2014. Dr. Durham saw claimant at least every three months to administer his chronic pain medications. Dr. Durham testified that between 2009 and 2012, he prescribed increasingly stronger narcotic medications to deal with claimant’s increased pain. He testified claimant’s physical condition, including chronic low back pain, radicular symptoms and weakness, deteriorated over those three years.

Dr. Durham testified he authored the letter claimant requested because he felt claimant would need to be on chronic pain medications indefinitely and “wasn’t a very good candidate to be working.”¹⁷ He agreed with claimant’s “inability to work.”¹⁸ Dr. Durham testified he believed claimant to be “essentially disabled.”¹⁹

On cross-examination, Dr. Durham acknowledged the October 11, 2012 letter was not something he initiated. Dr. Durham indicated he never placed any restrictions on claimant and testified the restrictions set out in his letter of October 11, 2012 came directly from claimant, which he simply took at face value, but added he “agreed” with them.”²⁰

¹⁵ Hardin Depo. at 12.

¹⁶ Benjamin Depo. at 16.

¹⁷ Durham Depo. at 15.

¹⁸ *Id.* at 23.

¹⁹ *Id.* at 18.

²⁰ *Id.* at 24; see also p. 17.

Dr. Estivo testified on April 1, 2014. Dr. Estivo reviewed Mr. Benjamin's task list and opined claimant could not perform 15 of 49 unduplicated tasks for a 30.6% task loss. He testified claimant could still perform the fitting room associate position and a people greeter job within Dr. Causin's restrictions. Dr. Estivo was unaware of Dr. Johnson's restrictions. Dr. Estivo testified claimant was not essentially unemployable and was capable of substantial and gainful employment.²¹ He testifies 98% of the time for respondents.

Claudia Hertel, respondent's personnel coordinator for over 23 years, testified on April 30, 2014. Her file did not contain Dr. Mellion's December 1, 2008 restrictions. She testified respondent followed Dr. Causin's restrictions from February 25, 2009 until claimant resigned in September 2012. Ms. Hertel testified respondent always tries to accommodate restrictions. She testified absent claimant's voluntary retirement, respondent would have continued to accommodate him as a fitting room associate or as a people greeter and, if necessary, the positions could be modified to fit the restrictions from Drs. Johnson and Durham. She acknowledged not working with claimant in the fitting room, not being his supervisor and not having knowledge of problems he may have had performing his job. She agreed the fitting room associate job, which required bending, twisting, pulling and stooping, was outside some of claimant's restrictions, absent additional job modification. She was unaware of claimant's medical treatment after she received Dr. Causin's report. She did not know if claimant was offered the people greeter position.

In pertinent part, the judge's decision stated:

In **Wardlow v. ANR Freight Systems, 19 Kan.App.2d 110, 114, 872 P.2d 299 (1993)**, the Court of Appeals looked to the claimant's age, training, previous work history, and physical limitations to determine whether he was permanently and totally disabled. Here, Claimant's physical limitations are in question. No authorized treating physician has imposed the work restrictions under which Claimant will agree to work, light duty with an hour of sitting followed by a half hour of standing or walking. In any event, Respondent has two positions that would accommodate those restrictions.

Claimant agrees that he can work if those restrictions are accommodated. Under these circumstances, only Mr. Hardin opines that Claimant is permanently and totally disabled. Both Drs. Johnson and Estivo agree Claimant can work within either of their recommendations for permanent work restrictions, and Mr. Benjamin agrees Claimant can engage in substantial, gainful employment activity within those restrictions, even if Respondent had been unable or unwilling to accommodate. Here, Claimant chose to resign, to "retire," and thereafter seek Social Security Disability benefits. There is no evidence that he requested any additional accommodations from Respondent before choosing that course of action. With his concession now that he *could* work within Dr. Johnson's restrictions, Claimant apparently concedes that he remains capable of engaging in substantial, gainful employment activity.

²¹ See Estivo Depo. at 15.

Claimant has failed to sustain his burden of proof that he is permanently and totally disabled within the meaning of the Kansas Workers Compensation Act.²²

Claimant filed a timely appeal.

PRINCIPLES OF LAW

Claimant must prove the right to an award of compensation and to prove the conditions on which that right depends.²³ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”²⁴

K.S.A. 44-510c(a)(2) (Furse 2000), defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, shall, in the absence of proof to the contrary, constitute a permanent total disability. . . . In all other cases permanent total disability shall be determined in accordance with the facts.

Case law indicates permanent and total disability is:

[B]ased on a totality of the circumstances including [Wardlow’s] serious and permanent injuries, the findings of Drs. Prostic and Redford, the extremely limited physical chores [Wardlow] can perform, his age, his lack of training, driving and transportation problems, past history of physical labor jobs, being in constant pain, and constantly having to change body positions.²⁵

The Kansas Court of Appeals held, “The trial court’s finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent.”²⁶ *Wardlow* has been followed in numerous cases.²⁷

²² ALJ R&M Award (July 1, 2014) at 7.

²³ K.S.A. 2006 Supp. 44-501(a).

²⁴ K.S.A. 2006 Supp. 44-508(g).

²⁵ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 114, 872 P.2d 299 (1993).

²⁶ *Id.* at 113.

²⁷ See *Blankley v. Russell Stover Candies, Inc.*, No. 110,014, 2014 WL 2590035 at *3 (Kansas Court of Appeals unpublished opinion filed May 30, 2014); *Loyd v. ACME Foundry, Inc.*, No. 100,695, 2009 WL 3378206 at *5 (Kansas Court of Appeals unpublished opinion filed Oct. 16, 2009); and *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 102 P.3d 1169 (2004).

From July 1, 1993 forward, the Board assumed the de novo review of the district court.²⁸ Board review of an administrative law judge's order is de novo on the record.²⁹ "The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made."³⁰ De novo review, in the context of an administrative hearing, is a review of an existing decision and agency record, with independent findings of fact and conclusions of law.³¹

"It is the function of the [Board] to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability."³² The Board "is free to consider all of the evidence and decide for itself the percentage of disability."³³

ANALYSIS

Claimant is permanently and totally disabled.

Claimant is permanently and totally disabled for the following reasons:

- After two low back surgeries, he continues to have ongoing and increasing low back pain, left leg radiculopathy and weakness. He contends he is in pain every hour of every day. Claimant has had to take increased doses of stronger narcotics as his pain progressively worsened.
- His physical abilities are extremely limited, especially in light of his prior work history which includes jobs requiring heavy lifting. The majority of physicians limit claimant to light duty labor. Dr. Causin limited claimant to light duty. Dr. Johnson restricted claimant not just to light duty, but to the restrictions claimant believed he should have – no lifting over 10 pounds, no bending or lifting from a bent position, and sitting for one hour followed by moving around for 30 minutes. Dr. Durham, the treating physician, also adopted such restrictions. While such restrictions may have been conjured in claimant's mind and were never given to him by Dr. Mellion, Drs. Johnson and Durham nonetheless adopted such restrictions. Dr. Estivo's restrictions are the outlier.

²⁸ See *Nance v. Harvey Cnty.*, 263 Kan. 542, 550-51, 952 P.2d 411 (1997).

²⁹ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

³⁰ *In re Panhandle E. Pipe Line Co.*, 272 Kan. 1211, 39 P.3d 21 (2002); see also *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan. App. 2d 360, 363, 212 P.3d 239 (2009) ("[D]e novo review . . . [gives] no deference to the administrative agency's factual findings.").

³¹ *Frick v. City of Salina*, 289 Kan. 1, 20-21, 23-24, 208 P.3d 739 (2009).

³² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 786, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

³³ *Id.* at 784.

- Mr. Hardin opined claimant was essentially and realistically unemployable. Dr. Durham, the prior authorized treating physician, indicated claimant cannot work. Claimant testified he is unable to work. His testimony that he could work under Dr. Johnson's restrictions was conditioned on respondent truly having accommodated work and not deviating from such restrictions. Claimant's testimony suggests he did not believe Dr. Johnson's restrictions would be fully honored. Before he resigned, he told respondent he was having difficulty performing his accommodated work. Such testimony was not contradicted. Claimant's testimony that he would try to work for respondent – if they truly provided the accommodations he needed – is not conclusive in showing he is able to work. Rather, claimant's testimony was that his prior accommodated work was not truly within his restrictions and, in practice, he would need to violate his restrictions to perform his job.
- Claimant's separation of employment, while a voluntary choice to retire, was occasioned by his deteriorated low back condition. Claimant need not ask for additional accommodation before resigning.
- Claimant turns 65 in January 2015. He has an 8th grade education and a G.E.D.

Based on the factors from *Wardlow*, claimant is essentially and realistically unemployable. He is permanently and totally disabled.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds claimant is permanently and totally disabled.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that Administrative Law Judge Bruce E. Moore's July 1, 2014 Review & Modification Award is modified as follows:

The claimant is entitled to 18.43 weeks temporary total disability compensation at the rate of \$265.31 per week or \$4,889.27, followed by 94.229 weeks of permanent partial disability compensation at the rate of \$265.31 per week or \$25,000 for a 22.896% work disability. Beginning September 21, 2012, claimant is entitled to permanent total disability benefits not to exceed \$125,000 less benefits previously paid. As of November 17, 2014, claimant is entitled to 112.43 weeks of permanent total disability benefits at the rate of \$265.31 or \$29,828.80 followed by weekly payments of \$265.31 until the \$125,000 permanent total disability award is paid out, less benefits previously paid.

As of November 17, 2014, there would be due and owing to the claimant 18.43 weeks of temporary total disability compensation at the rate of \$265.31 per week in the sum of \$4,889.27 plus 94.229 weeks of permanent partial disability compensation at the rate of \$265.31 per week or \$25,000 plus 112.43 weeks of permanent total disability benefits at the rate of \$265.31 or \$29,828.80 for a total due and owing of \$59,718.07, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$65,281.93 shall be paid at \$265.31 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of November, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Bruce E. Moore